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No. 82-2157

In The
Supreme Court of the United States
October Term, 1983

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Petitioners,

vs.

CENTRAL TRANSPORT, INC., et al.,

Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTRODUCTION

This Court invited the United States to express its views by Order dated October 3, 1983. As late as April, 1984, the United States informed Central Transport, Inc., et al., ("Transport") that it had not concluded whether this case was worthy of review. The United States now alleges that the decision of this Court in *Schneider Moving & Storage Co. v. Robbins*, No. 82-1860 (U.S. April 18, 1984)

requires the grant of a Writ of Certiorari or that the judgment of the court of appeals in this case (*"Central Transport"*) should be vacated and the case remanded for reconsideration.

Transport has already asserted why this matter is not worthy of this Court's review (Brief in Opposition to Petition, dated July 19, 1983). This Brief is limited to expressing why the *Schneider* decision calls for neither review by this Court nor remand to the court of appeals.

DISCUSSION

This Court held in *Schneider* that Central States, et al., ("Funds") did not have to exhaust arbitration procedures before seeking judicial enforcement of Trust Agreement provisions. The decision in *Central Transport* does not conflict with that holding. In fact, the *Central Transport* court specifically recognized the inability of the Funds to invoke the union-employer arbitration procedure by granting the Funds direct judicial access to confidential employer records if the Funds have "reasonable cause" to suspect contribution delinquencies.

The *Central Transport* court held:

> . . . the terms of Article IV of the trust agreements . . . give the trustees the power and authority to inspect Transport's books and records and question such persons as they deem necessary to enable them to determine facts relative to a particular employee's covered or non-covered status if they have reasonable cause to believe that a *particular employee* is covered by the collective bargaining agreement, i.e., is doing bargaining unit work, but has not been

> placed on the Union seniority list or otherwise classified by Transport or the Union as a covered employee.

Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 698 F.2d 802, 810 (6th Cir. 1983), *rehearing and rehearing en banc denied;* (Petition Appendix B, p. A-28). The *Central Transport* court gave the Funds a "reasonable cause" right of inquiry to compensate them for their lack of access to the grievance/arbitration mechanism of the collective bargaining agreements:

> The Funds have no contractual right to participate in this dispute resolution process [the grievance/arbitration mechanism]. The "reasonable cause" standard strikes a balance between the trustees' needs to satisfy their statutory and contractual obligations in the limited situations in which the investigation of proper Funds' contributions are warranted yet preserves the privacy and integrity of the grievance and arbitration provisions agreed to by Transport and the Union as a means of resolving questions of employee coverage.

(*Id.* at 812; Petition Appendix B, p. 17). That holding does not violate the rule in *Schneider* but extends the *Schneider* holding to its logical conclusion and balances the interests of all competing parties.

The United States would destroy the reasonable cause standard of restraint. The Funds would merely have to make a self-serving allegation that underfunding may have occurred for admittedly covered employees to get access to the confidential employment and wage records of *all* employees—even those of shareholder-officers of the employer. The United States would have *Schneider* give the Funds the power to review all records without regard to any standard of propriety.

The United States asserts that the *Central Transport* court made its decision before *Schneider* was decided. That is at the same time both true and immaterial. The March 24, 1982 decision of the Eighth Circuit in *Schneider* prior to rehearing *en banc* was cited by the Funds before the Sixth Circuit in this case and was presumably considered by the Sixth Circuit. That decision held:

> This [arbitration] provision, when read in connection with the Trust Agreement provision which authorizes the Trustees to institute legal actions in order to enforce payment of amounts which may be owed to the Funds, seems to indicate that the parties did not contemplate that the Trustees are required to resort to the grievance-arbitration procedures delineated in the collective bargaining agreements in all cases.
>
> We think this conclusion comports with national labor policy. . . .
>
> In addition, the Trustees should not be required to ask the Union to arbitrate this dispute.

Robbins v. Prosser's Moving & Storage Co., and *Robbins v. Schneider Moving Co.*, Nos. 80-2116, 80-2117 (8th Cir. March 24, 1982). (This opinion was published in the advance sheet at 673 F.2d 246 but was withdrawn from the bound volume because rehearing was granted.) Moreover, the Sixth Circuit reconsidered its decision in denying a rehearing and a rehearing *en banc* to the Funds.

Even the Eighth Circuit did not find its *en banc* decision in *Schneider* as overruling its entire opinion in a case with facts similar to this case. *Central States, Southeast and Southwest Areas Pension Fund v. CRST*, 641 F.2d 616 (8th Cir. 1981) limited the funds' audits to records of covered employees. Thereafter, when the Eighth Circuit issued its *en banc* decision in *Schneider*, the court only stated that *CRST*'s decision should not be read to require arbitration prior to filing a court action:

> We hold only that the trustees may come into this court without first getting the union to invoke the machinery of arbitration. To the extent that . . . *CRST* [is] . . . inconsistent with this holding, . . . [it] is overruled.

Robbins v. Prosser's Moving & Storage Co., and *Robbins v. Schneider Moving Co.*, 700 F.2d 433, 443 (8th Cir. 1983).

The Eighth Circuit *en banc* and this Court did not change the substance of the finding of the original panel of the Eighth Circuit in *Schneider*. Accordingly, the court of appeals in *Central Transport* had the reasoning of *Schneider* in the materials submitted by the Funds which it considered in issuing its opinion.

CONCLUSION

The decision of this Court in *Schneider* does not mandate the issuance of a Writ of Certiorari or the vacation of the unanimous decision of the Sixth Circuit Court of Appeals. Judge Cornelia Kennedy had the first *Schneider* appellate court decision before her when she determined this contract controversy and properly balanced the competing interests of the Funds and Transport. The Sixth Circuit further considered the *Schneider* reasoning when it denied the Funds' motion for rehearing and for rehearing *en banc*.

Respectfully submitted,

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